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490524—58——1

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 513

SAM COURTNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is not yet reported. The opinion of the Court of Appeals, reversing petitioner's conviction for contempt, is reported at 236 F. 2d 921.

JURISDICTION

The judgment of the Court of Appeals was rendered on August 20, 1958, and petition for rehearing denied on October 14, 1958. The petition for a writ of certiorari was filed on November 13, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether on a trial for perjury the court erred in refusing to grant a mistrial because the govern-

ment's opening statement mentioned petitioner's prior refusal to testify before the grand jury because of possible harm to petitioner's business if he answered, where the court sustained the objection and instructed the jury to disregard the statement:

2. Whether sufficient evidence was adduced to prove the materiality of the perjured testimony.

3. Whether the trial court erred in permitting proof of materiality in the presence of the jury, where no request was made for their exclusion.

4. Whether the trial court should have submitted to the jury, in the absence of request therefor, the question whether the grand jury was investigating racketeering and kindred matters, where there is admittedly no real dispute that such was the fact.

5. Whether the evidence was sufficient to satisfy the rule that a charge of perjury must be supported by the testimony of at least one witness, together with corroborating circumstances.

STATUTE INVOLVED

18 U. S. C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined

not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted in the District Court for the Southern District of New York on all ten counts of an indictment charging perjury by petitioner before a grand jury. He was sentenced to three years imprisonment on each count, to run concurrently, together with a fine of $2,000 on the first count (R. 3–17, 449, 463).[1] The Court of Appeals affirmed (Pet. App. A).

The evidence in the record may be summarized as follows:

Petitioner is the senior partner of the Courtney Trucking Company, operating in New York City (R. 50). In 1956, a special grand jury was impaneled to investigate charges of racketeering in the garment and trucking industries, including the payment of money to racketeers or union officials to buy "protection" (R. 52–53). The books of petitioner's company were examined, particularly as to a "Garage, Gas & Oil" account,[2] for which no vouchers appeared.

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[1] The record consists of the following:

The defendant-appellant's appendix in the Court of Appeals, which petitioner has filed herein and marked as "Vol. I". The pagination is from 1 to 472. The government's appendix in the Court of Appeals, which petitioner has filed herein and marked as "Vol. II". The pagination thereof is from 1a to 309a. In view of the distinctive pagination, both volumes are referred to herein as "R.", the pagination indicating to which volume reference is made.

[2] This account was variously labeled in the company books as "Gasoline & Oil", "Garage Gas Oil etc.", "Garage Gas Oil Tires" and "Garage Gas & Oil".

For the first twenty-four weeks of the company's existence the amount of this account remained constant at $100 per week. At the same time there was a second expense account, for office expenses, which varied between $1.77 and $55.50 (R. 168–169, Government Exhibit 14, filed herewith).[3] On the twenty-fifth week, the two expense accounts were consolidated in the amount of $166.98. The following week they were again separated, in the respective amounts of $100 and $42.35. Thereafter, the two accounts were again consolidated and remained so during the remainder of the period of the grand jury's investigation, which covered 276 weeks. During the first twelve weeks of this latter period the amount in this account never fell below $126.47 and never went above $200.95. During the next twenty-five weeks of this period the minimum amount in this account was $215 and the maximum was $260.96. There was then another sudden jump[4] and the minimum during the balance of the period investigated never fell below $304.76, the maximum weekly payment being $522.42 (Government Exhibit 14). The total charged to this account exceeded $20,000 in both 1954 and 1955, all of which was unvouchered (Government Exhibit 14, R. 174, 250a).

Petitioner was called by the grand jury and was asked to explain where the money went which was

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[3] The other two disbursement accounts were payroll and partners' drawing account (Government Exhibit 14).

[4] At the end of November, 1951, when the expenditure charged to this account was $356.37, as compared to $226.83 for the previous month.

charged to this account. He admitted that it did not go for gas, oil or for garage. The company started out owning its own trucks, but had changed to a truck rental arrangement, whereby the lessor paid all these expenses. There were three personal cars for the three partners, but the expenses connected therewith were paid by check (R. 237a–246a).

Petitioner testified that the money charged to this account was spent for miscellaneous expenses, principally gratuities to the employees at the places of business where his trucks called (R. 247a–254a). He further testified that he and one of his partners, Mr. Senter, distributed the gratuities at freight elevators and packing houses.[3] Petitioner stated that he might go into fifty buildings a week, approximately ten per day, and give out tips ranging from one to five dollars (R. 288a–291a).

Petitioner's testimony as to the week ending June 22, 1956, was the basis of this indictment. He testified that during that week, which was the week just before his testimony, he had visited about ten packing houses, naming five. He also named five other buildings he visited. One of these he visited seven or eight times, another several times. He did not necessarily pay out money each time. He named two at which he paid out money four or five times. He paid out thirty to forty dollars in the five buildings which were named, to freight elevator operators, starters and assistant starters, and forty to fifty dollars in the packing houses (R. 297a–301a).

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[3] A "packing house" is a place where freight is delivered, to be consolidated for the shipper (R. 286a).

Petitioner was then asked by the grand jury to name any individuals to whom he paid this money. He refused to answer, giving as his reasons, "That it affects my business"; "that it will impair my business"; that "there is no one who receives the money that will admit it"; and that "if we do tell, the man who receives it, the man will lose his job." The grand jury excused him to consult his attorney in the anteroom. He returned and stated that he still refused, for the reasons he had already given. The grand jury then asked the district judge to hold a hearing. At this hearing petitioner, through his attorney, for the first time urged his rights under the Fifth Amendment, although the attorney could name no statute under which petitioner might be incriminated. The judge directed him to answer. He refused and was sentenced to three months imprisonment for contempt. The Court of Appeals reversed the conviction, holding that subsequent answers by petitioner might have revealed that gratuities to a single individual had aggregated more than $600, making him criminally liable under the income tax laws, and that petitioner was entitled to raise the point under the Fifth Amendment, although his reasons initially given before the grand jury did not mention it. *United States* v. *Courtney,* 236 F. 2d at pages 922–923, 924–925.

Following the reversal of the conviction for contempt, petitioner was indicted for perjury in his testimony to the grand jury as to gratuities he claimed to have paid during the week ending June 22, 1956, as set forth, *supra,* at page 5. The government called the employees at the various places of business

named by petitioner. They testified that during the week in question none of them had received any gratuities from petitioner (R. 105–154, 181–212, 265–291, 307–314, 2a–167a).

It was also shown that petitioner had full knowledge of the handling of the "Garage, Gas & Oil" account. He prepared for the company bookkeeper a weekly work sheet, which set forth, among other things, the amount to be charged against this account (R. 227). The total shown on the worksheet would be drawn from the bank and the checks and check stubs would be in accordance with the amounts appearing on the work sheet (R. 228).[6] After all salaries and partners' drawing accounts had been paid, the balance would be turned over to petitioner (R. 236). From this balance petitioner would replenish the cash box, the amount of which would run between fifty and sixty dollars per week (R. 236–237).[7]

When the accountant started to keep the company books he asked petitioner the nature of the $100 weekly item which appeared on the check stubs. Petitioner replied that it represented drivers' out-of-pocket and other expenses. On the basis of this conversation, the accountant labeled the account "Garage, Gas & Oil", although he understood that it included

[6] The amounts shown on the check stubs were thereafter transcribed to the regular books of account by an independent accountant, who came in periodically to keep the company books (R. 156).

[7] Petitioner originally told the grand jury that the amount would be considerably higher, but finally said that if the bookkeeper said it was around fifty or sixty dollars, that would be correct (R. 267a–272a).

other items (R. 170–172). He did not know who got the money (R. 170–171).[4] He did not recall ever having seen any vouchers or itemization of this account. He advised petitioner that if the income tax agents examined his records and found no substantiation for this account, they would disallow it as an item of expense. Petitioner replied that if that happened he would have to suffer the consequences (R. 174–175).

In his opening statement at the petitioner's trial for perjury, the Assistant United States Attorney mentioned petitioner's reluctance before the grand jury to name the packing houses in question and added (R. 47):

> Then Courtney was asked, "To whom do you say you gave out this money? Give us the names of those persons." And the defendant Courtney refused to answer.

Petitioner moved for a mistrial. The court denied the motion, but admonished the jury to disregard the statement.[5] Later, during the trial, the government sought to introduce that part of petitioner's testimony before the grand jury in which he had refused to name the recipients of his gratuities on the ground that to do so would hurt his business. The court was inclined for a time to admit this evidence (R. 88–92), but finally concluded, in view of the Court of Appeals opinion in the contempt case, to exclude it (R. 95–102).

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[4] The bookkeeper knew that petitioner received this money, but did not know what was done with it, except that from fifty to sixty dollars per week was used to replenish the cash box, as above noted (R. 236–237).

[5] The court's admonition, claimed by petitioner to be inadequate, was as follows (R. 47–49):

1. The trial court did not err in refusing to declare a mistrial because of the government's opening statement. Defense objection thereto was promptly sus-

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"The COURT. Well, I do not understand any motion for a mistrial at this point. Go on.

"Any refusal to answer has nothing to do with this case.

"MR. DELANEY. The U. S. Attorney has said that Mr. Courtney, while before the grand jury refused to answer certain questions. That he had a right to do so or not, is another matter, but there is no right of the U. S. Attorney to state that to any petty jury, and I certainly move for a mistrial at this time.

"The COURT. Certainly the question as to whether he has refused to answer has nothing to do with this case and nothing to [do] with this jury. The only question we have here is whether he gave false testimony before the grand jury, and I will so instruct this jury.

"I will deny your motion for a mistrial. I think the jury understands perfectly that the only issues before this jury are whether he gave false testimony. The witness under certain circumstances has a perfect right to refuse to answer questions before the grand jury. Whether he did or not has no bearing upon the issues before this jury.

"Likewise I point out that whether this was a grand jury investigating racketeering or anything else has no bearing upon this case whatsoever, and anybody who appears before any grand jury is sworn to tell the truth, is supposed to tell the truth.

"Whether this was a grand jury investigation into racketeering or anything else that might come before a grand jury has no bearing upon this question, which is purely a question: Did the man intentionally lie before the grand jury? That is the only question before this jury here, and therefore the jury will put out of their mind any question as to whether this was racketeering. It might be any one of numerous problems that the grand jury is looking into, and whether the man refused to answer has no bearing upon that question. A man has a right at certain times to refuse to answer before a grand jury, and it is not for me or this jury to consider that in connection with this case.

"Go on, Mr. Wachtell.

"Forget anything about refusing to answer before a grand jury. That has nothing to do with this case."

tained and the jury fully instructed to disregard the statement (R. 47–49). Definite instructions that the jury should determine the case upon their recollection of all of the evidence and not upon what counsel may have said and to disregard matter stricken from the record were also included in the charge (R. 429–430).[10] It is presumed that the jury followed these instructions. *Delli Paoli* v. *United States*, 352 U. S. 232.

The United States Attorney in good faith believed this reference proper as his argument to the trial court on the admissibility of this evidence shows (R. 67–102). Indeed, it appears that the judge was more favorable to petitioner than was required in excluding all references to the refusal to answer.

Petitioner had testified to the grand jury that the money whose expenditure was in question had gone for the payment of gratuities or tips to various employees at the places where his firm did business. When asked where these employees worked, he answered. However, when asked who the employees were, he refused to answer, giving such various reasons wholly unconnected with the Fifth Amendment as that his answer would hurt his business, that it would hurt the employees in question, or that they would all deny it anyway. Regardless of whether his subsequent claim of self-incrimination was properly

[10] The judge offered to renew explicit instructions at the close of the evidence concerning petitioner's prior refusal to testify before the grand jury, which offer defense counsel thought it best to refuse (R. 232a).

upheld, the United States Attorney had good reason to believe that it was proper to show that petitioner had been afforded an opportunity to specify the parties to whom he claimed to have given tips, and had refused to do so.

In any event, in view of the explicit instructions by the trial judge, no reversible error was committed. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 243.

2. The three questions raised as to the materiality of the perjured testimony—all of which are advanced for the first time in this Court—are interrelated and may conveniently be considered together.

a. The materiality of the testimony was adequately shown. The foreman of the grand jury testified that the subject of their investigation was racketeering in the garment and trucking industries, "to see whether there is any conspiracy to pay money to racketeers or union officials, to buy union protection," etc. (R. 53). The grand jury's interest in the business of petitioner was in the existence of an unvouchered account which had swollen in size to more than $20,000 annually. The account was charged to three items which, insofar as they existed at all, were paid by check. It inexplicably was a flat $100 per week at first, then $100 plus the small amounts previously charged to office expense, then jumped to $200 plus per week and then to $300 plus per week. These circumstances, in a business which was under examination for possible payments for protection or preferential treatment, required explanation. The purported explanation,

which proved to be perjurious, tended to keep the grand jury from learning the truth."

The perjury clearly related to a matter which was material to the investigation. The test laid down in *Carroll* v. *United States*, 16 F. 2d 951, 953 (C. A. 2), certiorari denied, 273 U. S. 763, has been widely adopted in subsequent decisions,[12] and equally applies here:

> The test of materiality in a grand jury's investigation is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation, and, if it does, an indictment for perjury may be predicated upon it.

b. No error was committed in receiving the testimony of the grand jury foreman in the presence of the jury trying the case. Petitioner made no request for the jury's exclusion (R. 52–53). Moreover, such proof ordinarily presents questions of both law and fact.

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[11] The grand jury was not interested in investigating the payment of tips in the trucking business, which practice had become quite customary and was entirely legal. There was no reluctance on the part of persons called as witnesses to admit the receipts of tips from petitioner's company at Christmas (R. 24a, 28a, 88a, 110a, 116a, 159a) and at other times, either at their own places of work (R. 260–261, 139, 82a–83a) or by going to the office of petitioner's company (R. 195, 312–313, 125). Likewise, similar payments by other companies were readily admitted (R. 107–109, 112, 116, 121, 126, 150–151).

[12] See, *e. g.*, *United States* v. *Hirsch*, 136 F. 2d 976, 977 (C. A. 2), certiorari denied, 320 U. S. 759; *United States* v. *Parker*, 244 F. 2d 943, 950 (C. A. 7), certiorari denied, 355 U. S. 836; *United States* v. *Moran*, 194 F. 2d 623, 626 (C. A. 2), certiorari denied, 343 U. S. 965.

The materiality of the allegedly perjured testimony is for the court. *Sinclair* v. *United States*, 279 U. S. 263, 298. Whether the accused gave the testimony allegedly given, whether he was under oath, whether the answers were willfully false, were issues for the jury. This is established by the very cases petitioner cites. *Harrell* v. *United States*, 220 F. 2d 516, 520 (C. A. 5), *Luse* v. *United States*, 49 F. 2d 241, 245 (C. A. 9). As in the *Harrell* case, the proof offered here, which was to the effect that the grand jury was investigating racketeering, was relevant on the issue of willfulness. It was not extensive and did not inject extraneous issues. Furthermore, at the time the grand jury foreman testified, the petitioner had neither stipulated nor conceded that there was no question of fact regarding the purpose of the grand jury investigation.

c. Materiality is recognized by petitioner to be a matter of law for the court. He nevertheless argues (Pet. 20–23) that the judge should have submitted to the jury for decision the question whether the undisputed factual base for the ruling did in fact exist, *i. e.*, whether the grand jury was in fact investigating racketeering. He admits that no dispute was raised on the issue and that there was no request for an instruction thereon. In these circumstances, there was nothing to submit to the jury. Whatever might have been the situation if there were a disputed issue of fact as to whether racketeering was the subject of the grand jury's investigation, the judge's ruling of law

on undisputed facts left no issue for the jury.[13] And certainly the absence of this instruction, without a request therefor, is not reversible error. Rule 30, F. R. Crim. P.

3. Petitioner's attack on the sufficiency of the evidence to meet the special test for perjury misconceives the nature of the rule as to the quantum of evidence in perjury cases. Unlike treason, where the two-witness rule requires that there be two witnesses to each part of each overt act, a conviction for perjury may be supported by the testimony of a single witness and corroborating circumstances. As Professor Wigmore phrases it (*Evidence*, 3d ed., Section 2042) "the treason rule requires two witnesses to the same fact; the perjury rule requires only one witness to the fact, and merely provides a means of reaching a belief in his testimony." We may accept *arguendo* petitioner's premise that the testimony of all elevator men in any one building that they did not receive gratuities must be taken together as the testimony of one witness showing that petitioner lied when he said he gave money to elevator men in that building, since it takes the testimony of all to show that no one of them

[13] In *Luse* v. *United States*, 49 F. 2d 241, 245–246 (C. A. 9), cited by petitioner, the court, when reversing on other grounds, expressed the view that testimony at a former trial could properly be presented to the jury, noting that the testimony would be relevant on the jury issue of whether testimony offered to show materiality was actually given. The court also noted that the testimony would be relevant on willfulness. It had no occasion to decide whether there had to be a charge on the issue where the facts were undisputed.

received the money.[14] It is nevertheless true that the testimony that petitioner lied as to a number of different buildings is corroborative evidence that petitioner lied when he said that he spent the money for "gratuities that we give to every building in the garment center" (See Count 1; R. 4). The testimony that petitioner lied as to a number of different buildings is also corroborative of the fact that he lied as to any particular one. Taking the testimony of each group as to each building as one witness, there was still sufficient quantitative evidence to meet the perjury rule. And there was, in addition, corroboration in the testimony of the bookkeeper and the accountant and in the books of account themselves, referred to *supra* at pages 4–5, which showed that the account in question, with the full knowledge of petitioner as senior partner in the firm, was being handled in such a manner as to make highly questionable the real purpose for which such funds were expended.

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[14] To the extent that petitioner claimed he gave gifts to a number of employees in one building, *e. g.*, five out of eight, it would not take all eight to show that he lied. As soon as four testified that they had not received tips, it would become clear that petitioner could not have given tips to five persons. Thus there would be corroboration even as to one building. Further corroboration appeared in the testimony of various witnesses to the effect that they had not seen petitioner give tips to other employees during the week in question (See, *e. g.*, R. 182, 188, 117a, 121a, 133a, 141a, 172a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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